

91-331

No. _____

Supreme Court, U.S.
FILED

AUG 30 1991

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

OFFICE OF THE CLERK

FASIH Q. ZAMAN, M.D.,

Petitioner,

vs.

SOUTH CAROLINA STATE BOARD OF MEDICAL
EXAMINERS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF SOUTH CAROLINA

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED
(as restated by Respondent)

- I. Whether a doctor with undisputed actual knowledge of the professional misconduct charges against him was denied due process by a Complaint which alleged his wrongful acts in great detail and charged that those acts constituted professional misconduct and a lack of professional competence?
- II. Whether due process was denied by the Medical Board's denial of an eleventh-hour, unsupported, motion for continuance based in part on alleged illness by one with a history of becoming "ill" in connection with proceedings against him?
- III. Whether the Medical Board correctly kept the name of the initial



complainant confidential when
Petitioner offered no factual
basis for his request for disclo-
sure?



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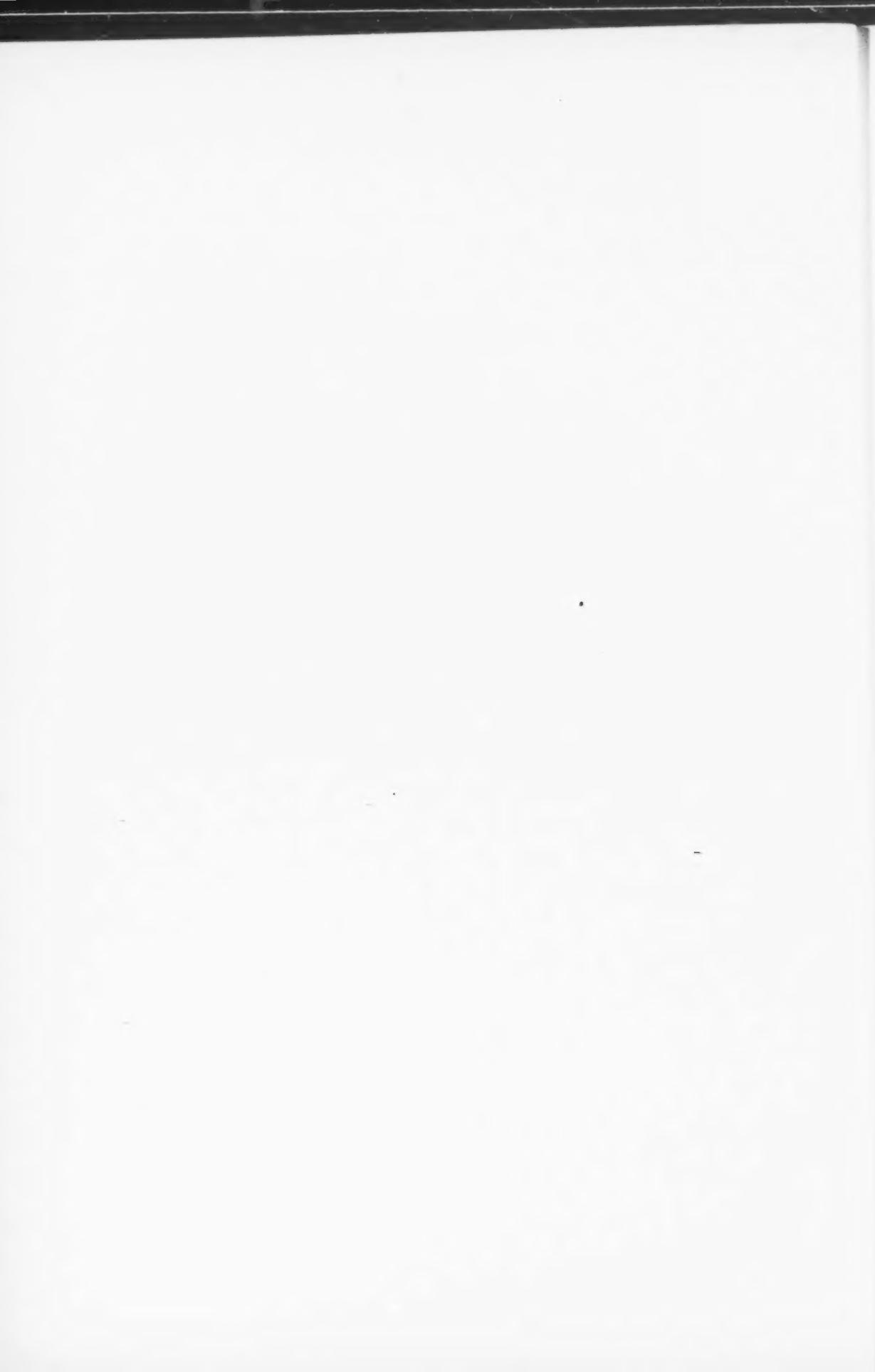


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STATUTES:

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STATEMENT OF FACTS

Petitioner Fasih Q. Zaman was a licensed South Carolina physician whose license was revoked by the South Carolina Board of Medical Examiners in 1988. Zaman has lived in Pakistan since 1985, and has not practiced medicine in South Carolina since then.

The proceedings against Zaman were initially brought in 1982. The charges of professional misconduct included instances where at least four of Zaman's patients died when, among other things, he failed to show up at the hospital for many hours after the patients were admitted on an emergency basis, or prescribed contraindicated medicines or heavy doses of narcotics to treat essentially physical ailments. For several of those who died, Zaman had issued "no code" orders (i.e., no heroic efforts or resuscita-



tion) without consulting either the patients or their families. The charges involved incompetent treatment of nineteen patients in all.

Although Zaman complains of lack of notice of the charges against him, he has failed to inform this Court, except perhaps in the most oblique manner, that the 1987 hearing under appeal was essentially a retrial of the same charges which were brought against him in 1982. The only reason for the retrial was that the Supreme Court of South Carolina in 1985, in a case unrelated to Zaman, declared the composition of the State Board of Medical Examiners invalid under the state constitution. Toussaint v. State Board of Medical Examiners, 285 S.C. 266, 329 S.E.2d 433 (1985). At both the first set of hearings which began in 1983, and in the retrial in 1987 the



charges pertained to occurrences between 1980 and 1982. No new charges were added in the second proceeding. But for the fortuitous (from Zaman's standpoint) circumstance of the State Medical Board's composition having been declared invalid under state law in the Toussaint case, the proceedings against Zaman would have concluded several years ago. 1/

A persistent feature of Zaman's conduct where disciplinary proceedings were concerned was his tendency to develop illness at about the time his case was due to be heard. This happened both in 1985, when he suddenly became too ill to be cross-examined by

1/ Another proceeding involving Zaman did reach the Supreme Court of South Carolina. It did not involve his license to practice medicine, but instead involved the termination of his staff privileges at a county hospital. In re Zaman, 285 S.C. 345, 329 S.E.2d 436 (1985).



the Medical Board's attorney, and also in 1987, when he claimed to have developed "acute coronary insufficiency" several days prior to the hearing date. On the day of the 1987 hearing, Zaman's counsel moved for a continuance based on Zaman's claimed illness. Nothing was offered in support of the motion, and the Medical Board's hearing panel accordingly denied the request for continuance. (A month later, Zaman submitted an affidavit from his physician which indicated that Zaman had largely recovered within that relatively short time.)

The hearing proceeded without Zaman present, and his counsel remained present and participated to some degree in the proceedings but, fearing a waiver, declined to cross-examine the Board's witnesses. Zaman was later offered various alternative methods to



present his side of the case to the Board, but refused them all. The Medical Board ultimately concluded that Zaman's license to practice medicine should be revoked. The Board's decision was affirmed by both the Circuit Court, App. 10-23, and the Supreme Court of South Carolina, App. 1-10. The Circuit Court noted that the record contained "substantial, indeed overwhelming, evidence of [Zaman's] numerous acts of professional misconduct." App. 13.

REASONS FOR DENYING THE WRIT

1. The charges against Zaman were clearly stated in the disciplinary Complaint.

The Petition for Certiorari is notably devoid of quotations from, or specific reference to, the Complaint filed by the Board against Zaman in this case. A review of just one of the

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nineteen charges, set forth verbatim below, reveals the high degree of specificity contained in the Complaint.

O. Case of Marie Ross

1. On March 27, 1982, Marie Ross, a 61 year-old female patient of the Respondent, entered the emergency room of the Cherokee County Memorial Hospital complaining of lower back pain; by telephone, the Respondent ordered routine laboratory work to be done and Demerol and Zomax to be administered but did not see the patient until the following day. On her admission, the patient had indications of decreased kidney function which condition steadily deteriorated; the Respondent, however, ordered no test to determine the cause of her deteriorating kidney function. The Respondent ordered anti-hypertensive medication for the patient and continued it for at least forty-eight (48) hours after the patient had become hypotensive; he ordered no vasopressor agent to be administered when she became hypotensive.



2. The Respondent treated the patient with a non-steroidal inflammatory (Naprosyn) in spite of her renal failure. On admission, the patient was anemic, according to the hemoglobin, which fell by March 30, 1982; but the Respondent did not check it thereafter. The Respondent ordered the insertion of a subclavian catheter but did not order a chest x-ray thereafter.
3. After noting steady deterioration in his progress notes on April 7, April 8 and April 9, 1982, the Respondent ordered that no resuscitation be attempted; and the patient expired on April 9, 1982.
4. As a result of the foregoing acts, the Respondent has violated Sections 40-47-200(7), (8) and (12), CODE OF LAWS OF SOUTH CAROLINA, 1976, as amended, and the Principles of Medical Ethics as set forth in Rule No. 81-60 of the Board in the following particulars:
 - (a) During the entire course of treatment for this patient, the Respondent made



no attempt to identify the cause of his patient's deteriorating kidney function, e.g., no analysis of urinary sediment, no ultrasound of the kidneys, no blood cultures to rule out sepsis, no central venous pressure to establish intravascular volume, no investigation to rule out collagen vascular disease, and no urine chemistry;

- (b) During the entire course of this treatment, the Respondent made no attempt to treat his patient's deteriorating kidney function;
- (c) During the entire course of treatment, the Respondent made no attempt to avoid or discontinue contraindicated medication such as Zomax and Naprosyn;
- (d) During the entire course of treatment, the Respondent made no attempt to consult



with a nephrologist, to use dialysis, or to transfer this patient to another facility;

- (e) The Respondent made no attempt to reverse his patient's deteriorating condition but instead ordered no resuscitation with inadequate information;
- (f) The Respondent did not evaluate or treat his patient's increasing anemia; and
- (g) The Respondent failed to order a chest x-ray after the insertion of a subclavian catheter, a routine procedure, because of the possibility of pneumothorax or hemorrhage.

Tr. 12-14.

The above-quoted portion of the Complaint is typical, in its amount of detail, of the rest of the Complaint. Clearly, Zaman was given ample notice of the wrongdoing alleged.



None of the cases cited by Zaman are remotely close to the facts of this case. Instead, the often-quoted due process standard for a complaint in an administrative matter is that the complaint is adequate if "the one proceeded against be reasonably apprised of the issues in controversy, and any such notice is adequate in the absence of a showing that a party was misled." Cella v. U.S., 208 F.2d 783, 789 (7th Cir. 1953); L. G. Balfour Co. v. F.T.C., 442 F.2d 1 (7th Cir. 1971).

Not only were Zaman's misdeeds set forth in great detail, but also the requisite standards were adequately charged. The Supreme Court of South Carolina has followed the general rule elsewhere that a charge of professional incompetence is sufficiently definite to provide notice that a physician's conduct must conform to generally ac-



cepted standards of medical conduct. App. 5; Toussaint v. State Bd. of Medical Examiners, ___ S.C. ___, 400 S.E.2d 488 (1991); Chastek v. Anderson, 83 Ill.2d 502, 416 N.E.2d 247 (1981) and cases cited therein. From the record, it appears that Zaman had not the faintest idea of what medical competence might be; but that failing was his own, not the Board's.

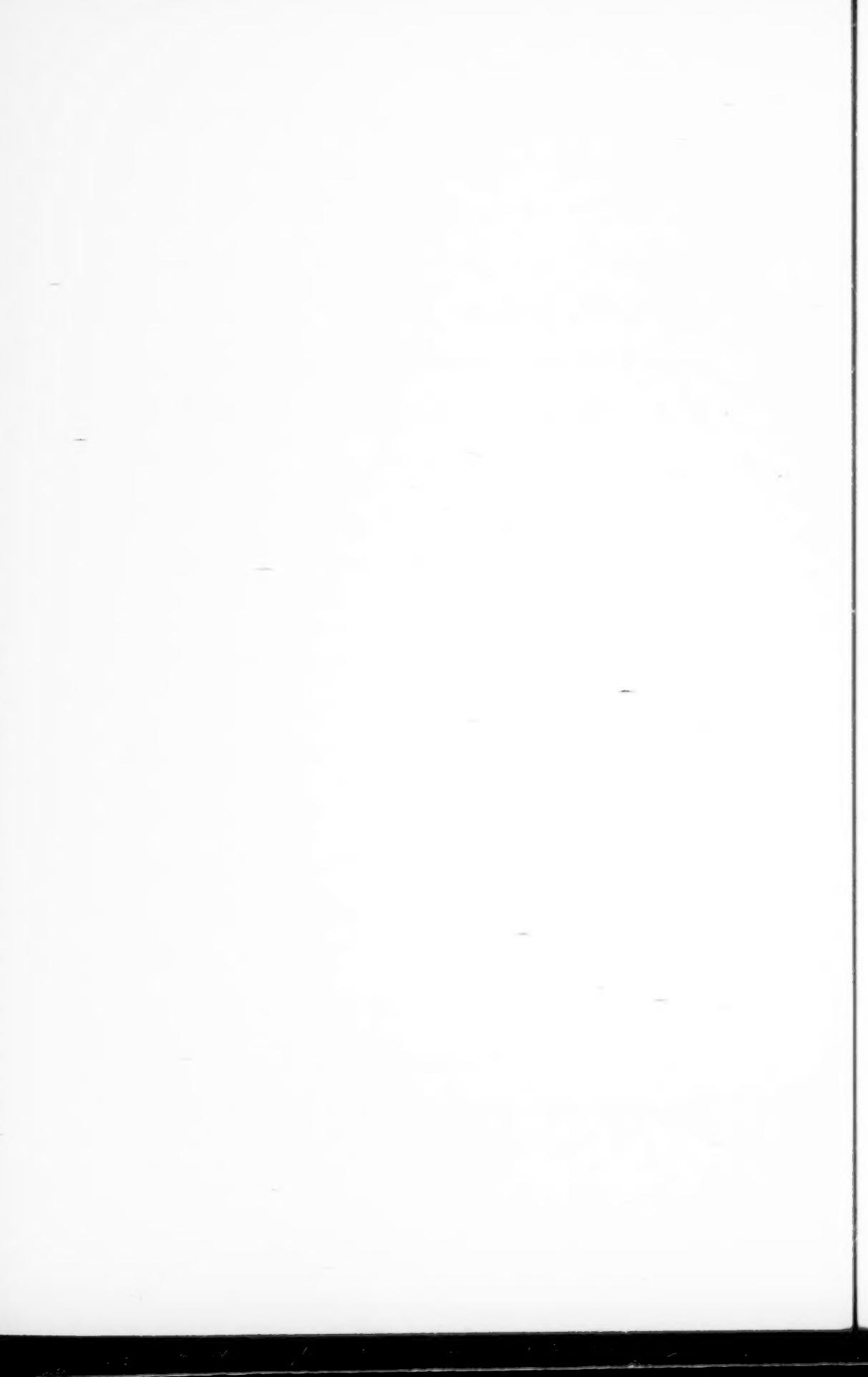
2. Zaman was completely familiar with the charges in any event, because the case had already been fully tried on a prior occasion.

As a matter of practical reality, Zaman's entire claim of lack of notice and knowledge is a complete misrepresentation. As previously noted, the entire case presented against him in 1987 had been presented in earlier hearings which had concluded two years earlier. A rehearing was necessary only because



in another case involving another physician the composition of the 1985 Medical Board had been invalidated as a matter of state law. In the prior hearing, the Board's entire case was presented (except for the cross-examination of Zaman, who not for the last time claimed illness, at least for that part of the proceedings). Zaman's Petition for Certiorari fails to inform the Court of the prior proceedings.

In Lyng v. Payne, ___ U.S. ___ 106 S.Ct. 2333, 2341 (1986), this Court held that one who had actual notice of a matter "clearly [had] no standing" to raise due process and other issues concerning notice. See also, e.g., National Equipment Rental Co. v Szukent, 375 U.S. 311, 314-315 (1964); Franklin v. White, 803 F.2d 416 (8th Cir. 1986); Wiren v. Eide, 542 F.2d 757 (9th Cir. 1976). As a result, this

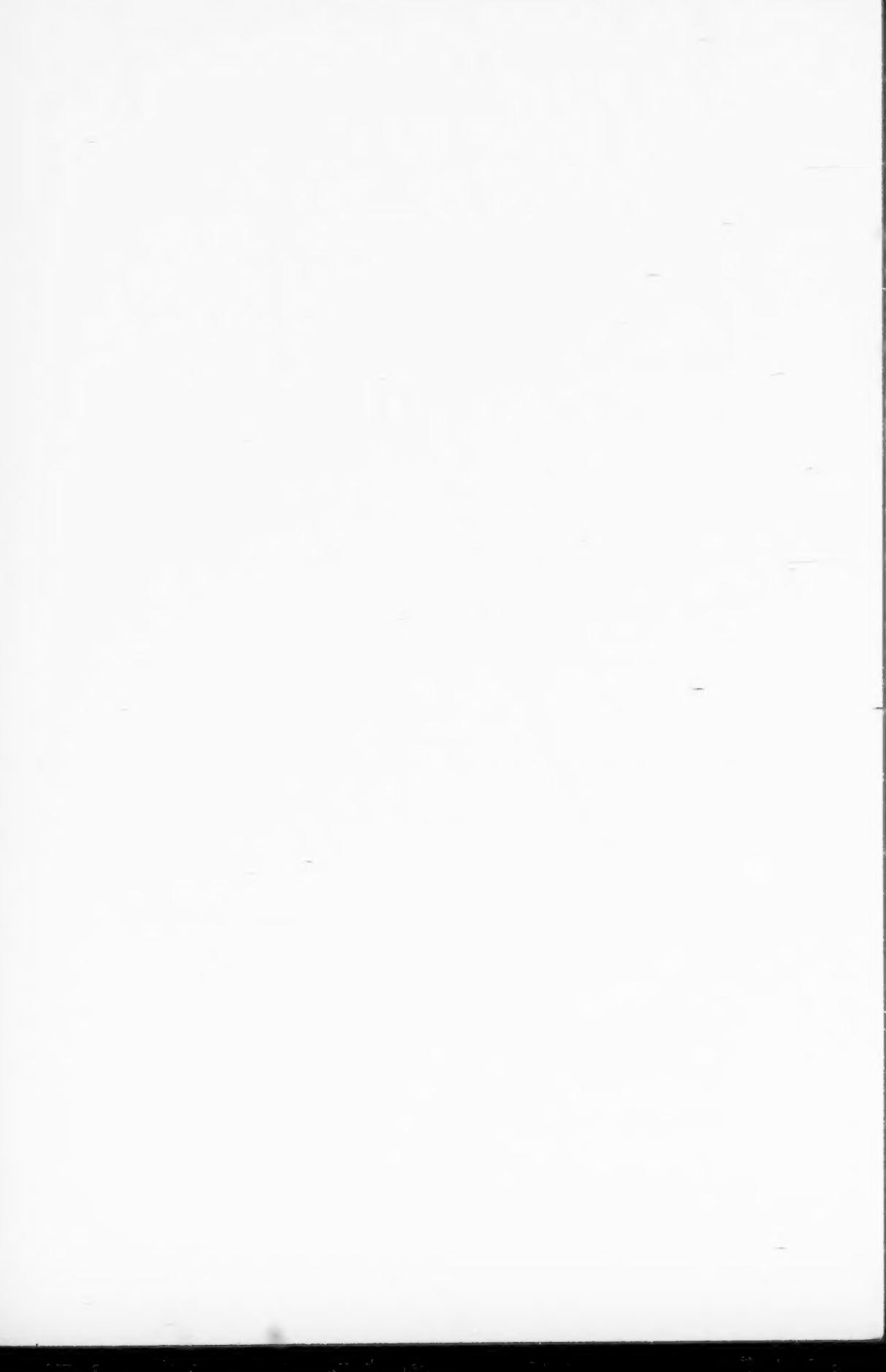


Court should reject any claim of lack of notice made by one who not only had the fullest actual knowledge imaginable, but also has failed to inform this Court of his prior knowledge.

3. No due process rights were implicated by the simple denial of a continuance.

In his second question, Zaman seeks to elevate a garden-variety continuance issue into a matter worthy of consideration on certiorari. Since such matters are normally within the discretion of the court (or administrative body) below, Ungar v. Sarafite, 376 U.S. 575 (1964), and since that discretion was reasonably exercised, this issue is manifestly without merit.

As the South Carolina Supreme Court held, "counsel moved at the panel hearing for a continuance without any evidence to support the need for one.



Based on the record, we hold there was no abuse of discretion in refusing a continuance and [Zaman] waived his right to cross-examination by failing to appear at the panel hearing." App. 9.

Clearly, the Medical Board did not abuse its discretion. Zaman had already on a previous occasion claimed to have developed a sudden illness which prevented him from attending the portion of the prior hearing where he was due to be cross-examined. His claimed illness in 1987 was just as sudden and also somewhat vague ("acute coronary insufficiency"). No supporting documentation or affidavit was presented with his oral request for continuance. While Zaman claims to have been "strictly instructed" not to travel by his physician on December 5, he did not contact his attorney until December 8



(the day before the hearing), a three-day lapse which strains credibility even taking into account the difficulty of telephoning from Pakistan. The Board was told only that Zaman was being hospitalized to undergo some tests for a possible heart problem. His physician's affidavit, dated a month later, averred that in less than thirty days, Zaman had progressed from a condition causing "grave concern" to one of mobility nearly sufficient to come to the United States.

In light of all of the above facts, the Board was faced with an unsupported claim made at the last minute by one who had previously claimed to develop a sudden illness coincident with a disciplinary hearing. There was no abuse of discretion in denying a continuance, and no issue



worthy of review by certiorari has been presented.

4. No constitutional issue is raised by the Medical Board's decision to maintain the confidentiality of the identity of the original complainant.

This case, as most professional disciplinary cases throughout the nation, began with a complaint filed by an individual. Sections 40-47-210 and 40-47-212, S.C. Code Ann., made such communications, including the complainant's identity, confidential, again following the general rule in professional disciplinary cases. Section 40-47-212 provides that disclosure of otherwise confidential information should be made if necessary to insure due process.

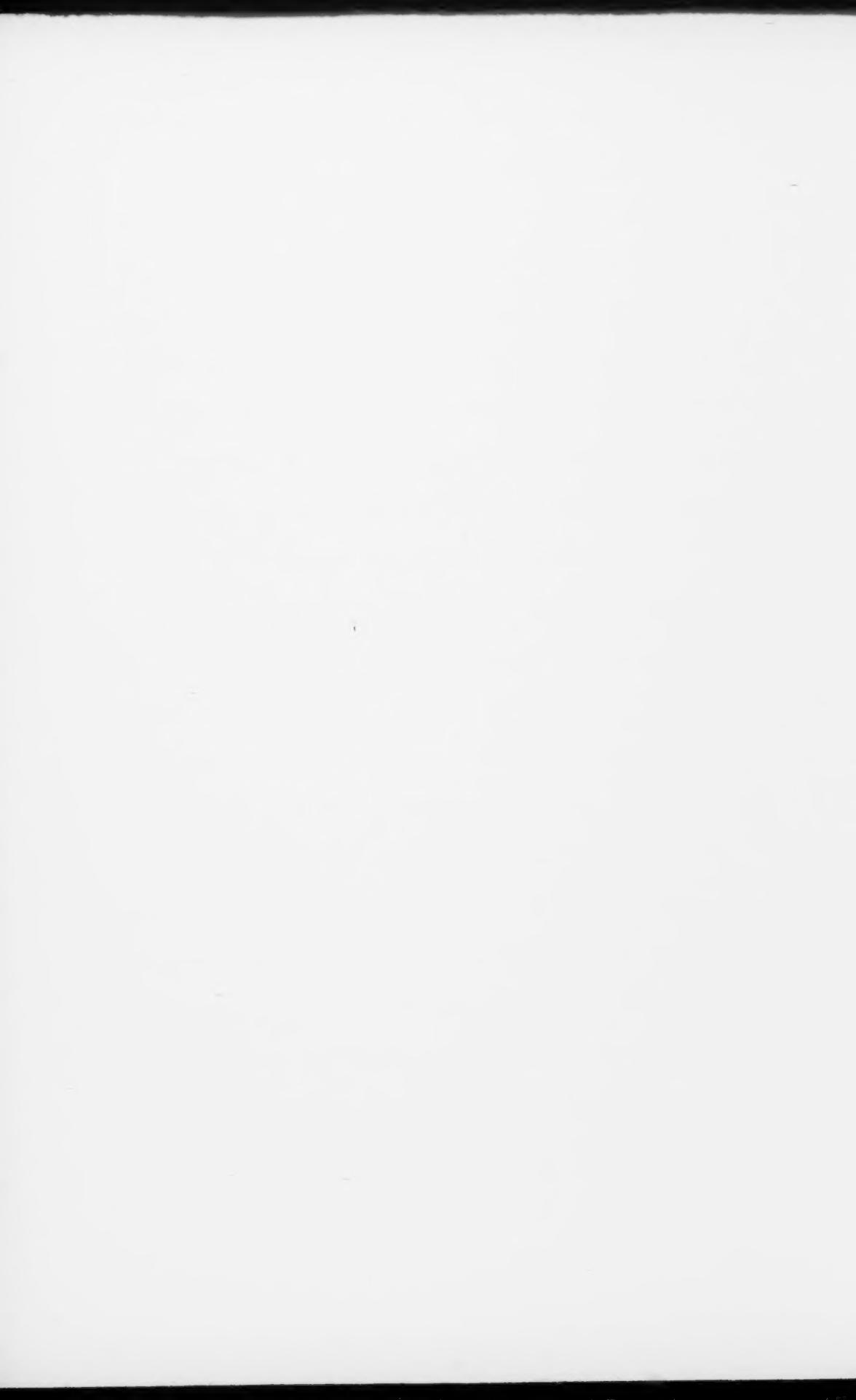
This Court has recognized in a somewhat different context that confidentiality is necessary and effective



in professional disciplinary cases.

Landmark Communications, Inc. v. Virginia, 435 U.S. 829 (1978). In a long line of cases including Roviaro v. U.S., 353 U.S. 53 (1957), this Court and others have held that the government may withhold the name of an informer unless disclosure is necessary to the preparation of an effective defense.

Zaman set forth no reason in the record below for abrogating the usual privilege. Thus, the Supreme Court of South Carolina, in addition to holding that this issue had not been timely raised and preserved, held that "the record provides no factual basis for raising this issue on appeal." App. at 10. This Petition likewise is devoid of factual support and presents no issue worthy of this Court's consideration.



CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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